UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

STERICYCLE, INC., Employer

and Case 32-RC-5603

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AUTO TRUCK DRIVERS, LINE DRIVERS, CAR HAULERS, AND HELPERS, LOCAL NO. 70 OF ALAMEDA COUNTY, CALIFORNIA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA Petitioner

Bruno W. Katz, Esq., (Shea Stokes Roberts & Wagner) of San Diego, California, and Peter G. Fisher, Esq., (Shea Stokes Roberts & Wagner) of College Park, Georgia for the Employer.

Jason Rabinowitz, Esq., and Zachary Leeds, Esq., (Beeson, Tayer & Bodine) of Oakland, California, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS

Jay R. Pollack, Administrative Law Judge: Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 32 issued a Supplemental Decision and Notice of Hearing before an Administrative Law Judge. I heard the matter in Oakland, California, on March 16, 2009.

The representation petition in this matter was filed on November 14, 2008 by International Brotherhood of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers and Helpers, Local No. 70 of Alameda County, California, International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America (the Union) on April 30, 2008. Pursuant to a Decision and Direction of Election issued by the Acting Regional Director for Region 32 on December 19, 2009, an election by secret ballot was conducted on January 16, 2009 in the following unit:

All full-time and regular part-time route drivers, lead route drivers, dispatchers and biotrack administrators employed by the Employer at the Employer's 1366 Doolittle Drive, San Leandro, California facility; excluding all other employees, including plant employees employed by the Employer at the Employer's 1345 Doolittle Drive San Leandro, California facility, plant supervisors, lead plant

workers, roll-off drivers, long haul drivers, shuttle drivers, warehouse workers, maintenance workers, maintenance supervisors, employees of contractors or temporary agencies, professional employees, office clerical employees, quards and supervisors as defined in the Act.

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The Tally of Ballots served on all the parties at the conclusion of the ballot count on February 3, 2009, showed the following results:

	Approximate number of eligible voters	36
10	Number of void ballots	0
	Number of votes cast for Petitioner	23
	Number of votes cast against participating labor organization	12
	Number of valid votes counted	35
	Number of challenged ballots	1
15	Number of valid votes counted plus challenged ballots	

Thereafter, Stericycle, Inc., (the Employer) filed timely objections to the election, a copy of which was served on the Union by the Region. The Regional Director set for hearing the following objection filed by the Employer:¹

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Before the election, the Union told members of the voting unit that they were required to file a federal lawsuit against Stericycle and hire the Union's lawyers, before the Union would file an RC petition with the NLRB. The Union agreed to front the costs and fees of the federal lawsuit. Using this lawsuit as leverage before the election, the Union enticed members of the voting unit into supporting them by subsidizing their legal representation.

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The Petition in this case was filed by the Union on November 14, 2008. Prior to the filing of the Petition, in September or October, the Union introduced unit employees to its attorneys. With a Union agent present, the attorneys discussed with the employees a wage and hour lawsuit alleging that the Employer did not provide rest periods and lunch breaks. An attorney – client representation agreement was given to employees which provided in pertinent part:

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Teamsters Local 70 ("Local 70") has agreed to the payment of all fees, costs, disbursement and litigation expenses.

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You agree to reimburse Local 70 for such advanced costs and expenses upon settlement, arbitration award or judgment. These items include, but are not limited to, attorney's fees, court fees, services of process charges, photocopy services, notary fees, computer-assisted legal research, long distance telephone charges, messengers and delivery fees, postage, in-office photocopying, facsimile charges, deposition costs, parking mileage, investigation expenses,

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¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

consultants' fees, expert witness fees and other similar items. All costs and expenses will be charged at our costs.

You authorize us to incur all reasonable costs and to hire any investigators, consultants or expert witnesses reasonably necessary in our judgment.

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Sixteen unit employees signed agreements containing the above language. Signed agreements were returned to the Union or the attorneys. A class-action lawsuit naming the sixteen employees was filed in Federal Court on November 19, 2008. The Employer offered testimony that employees were told that they could recover between \$10,000 and \$12,000 from the lawsuit. That testimony is not credited. Rather, I find that no dollar amount was discussed.

On January 7, 2009, the attorneys sent the sixteen employees a letter stating that Local 70 was not paying the legal fees of the lawsuit and that the attorneys were handling the case on a contingency fee basis. The letter stated that the attorneys expected that the fees were to be paid by the Employer as part of a settlement or judgment. The letter stated, "Therefore, the Union is conferring no benefit on you or the other drivers through the lawsuit."

It was not until after the election, that the attorneys presented the employees with an opt-in consent form to consent to join the class action and a new attorney-client representation agreement.

Analysis

In Savair Manufacturing, Co., 414 U.S. 270 (1973) the union won the representation election after offering to waive initiation fees for all employees who signed union authorization cards before the election. The United States Supreme Court held that the offer to waive initiation fees interfered with employees' statutory right to refrain from union activities and did not comport with the principle of fair and free choice of bargaining representative and was ground for denying enforcement of the Board's bargaining order.

In the instant case, the Union offered to pay the costs and litigation expenses of the wage and hour lawsuit. However, prior to the election the attorneys sent the sixteen employees a letter stating that the Union was not paying the expenses of the lawsuit and that the Union was not conferring a benefit on the employees. Apparently, the letter was not sent to other unit employees. The opt-in agreements and new attorney-client agreements were not signed until after the election.

In *Novotel New York*, 321 NLRB 624 (1996) the Board acknowledged Circuit Court law to the contrary, but found that a union that provided free legal services to unit employees, during the critical period, to investigate, prepare, and file a lawsuit asserting their wage claims under the Fair Labor Standards Act did not unlawfully interfere with an election. The Board, after acknowledging the historical role of unions in vindicating the rights of workers, found that a union's assisting workers in the exercise of their Section 7 rights to better their working conditions is fundamental to the statutory scheme of the Act.

Novotel drew a distinction between union conduct in the granting of a benefit which has no connection to the employer-employee relationship (e.g., paying employees to vote for the union) and union conduct that assists employees in improving their terms and conditions of employment. The Board found that although the union in Novotel had no legal obligation to file the FLSA lawsuit, it had a protected right to do so. Further the Board found that the company had not presented any evidence in support of its claim that the union conditioned the continued

receipt of legal representation on a favorable result in the election. The Board followed *Novotel* in *BHY Concrete Finishing, Inc.*, 323 NLRB 505 (1997).

In *Freund Baking Co. v. NLRB* 165 F3d. 928 (D.C. Cir. 1999), the Court held that a union's sponsorship of unit employees' lawsuit seeking overtime pay from the employer, filed one week before the union representation election, violated the Act's rule against providing gratuities during the critical period prior to a representation election. The Court ruled that a union is prohibited not only from blatantly giving an employee anything of value in exchange for his or her support in a representation election, but also from unconditionally providing a benefit in a way that tacitly obliges the employee to vote for it. However, the Board has not yet accepted this reasoning. The *Novotel* case is still outstanding Board law.

Thus, under existing Board law the Union had a statutory right to file the wage and hour law suit. Further, there is no credible evidence that the Union conditioned the continued receipt of legal representation on a favorable result in the election. Finally, prior to the election, the attorneys notified employees that the Union was not paying the expenses of the lawsuit and that the Union was not conferring a benefit on the employees.

Conclusions and Recommendations

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I recommend that the Employer's objection to conduct affecting the results of the election be overruled and that the Board certify the results of the election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:²

ORDER

The Employer's objection to conduct affecting the results of the election in the above matter is overruled. The Board shall certify the Petitioner as the collective-bargaining representative of employees in the appropriate unit.

Dated, Washington, D.C. April 24, 2009

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40 Jay R. Pollack

Administrative Law Judge

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² Any party may, under the provisions of Section 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. May 8, 2009.